The Machinery of Justice in a Changing Wales*

David Lloyd Jones

In recent years, immense changes have taken place in the machinery of government in Wales as a part of the process of devolution. Public attention has concentrated principally on the executive and legislative powers which have been transferred to new Welsh institutions under the Government of Wales Act 1998 and the Government of Wales Act 2006.[1] However, the Report of the All Wales Convention chaired by Sir Emyr Jones Parry draws attention to another aspect of devolution, observing that 'as devolution progresses, full account must be taken of the role and standing of the judiciary in Wales'.[2] In this article, I propose to survey the present state of the judicial branch of government in Wales and to consider the extent to which it is adapting to meet the needs of a devolved Wales.[3]

Wales does not have its own legal system. Unlike Scotland and Northern Ireland, Wales is not a separate jurisdiction within the United Kingdom. England and Wales share a single legal system. The 'Acts of Union' of 1536 and 1543 abolished Welsh law and provided that Wales should be subject to English law. It is true that a new courts system was created at this time for Wales, the Courts of Great Session, which administered royal justice in Wales, with the exception of Monmouthshire, until 1830.[4] However, they became ultimately subservient to the English courts whose dominance is demonstrated, for example, by the decision of the Court of King's Bench in 1723 in *R v. Athos*. Thomas Athos, Mayor of Tenby, and his son were accused of murder. The Attorney General succeeded in having the case transferred from the Great Sessions in Pembrokeshire to

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1 See, for example, previous lectures in the series sponsored by the Law Society: Carwyn Jones A.M., 'Law in Wales – The Next Ten Years', Law Society Lecture, National Eisteddfod of Wales, Cardiff and District (2008); Lord Elis-Thomas P.C., A.M., 'Wales's New Constitution – The First Two Years', Law Society Lecture, National Eisteddfod of Wales, Meirion and District (2009). [Note: these lectures do not appear to be available online as yet. Ed.]

2 *All Wales Convention Report*, <http://allwalesconvention.org/getinformed/thereport/thereport/?lang=en> [accessed 30 November 2010], paragraph 3.9.25.

3 Timothy H. Jones and Jane M. Williams, in 'Wales as a Jurisdiction', *Public Law* 78 (2004), 101, observed that there has never been a more interesting time to be an observer of the legal system in Wales. A great deal has happened since then. An illuminating recent view is provided by Sir Roderick Evans in his lecture, 'Devolution and the Administration of Justice', Lord Callaghan Memorial Lecture, 19 February 2010, Judiciary of England and Wales, <http://www.judiciary.gov.uk/media/speeches/2010/speech-evans-j-lord-callaghan-memorial-lecture> [accessed 30 November 2010].

4 The Courts of Great Session were abolished by the Law Terms Act 1830. The Council of Wales and the Marches created by Edward IV survived until 1689 when it was abolished. See Thomas Glyn Watkin, *The Legal History of Wales* (Cardiff, 2007), pp. 20, 153.

Hereford Assizes where they were convicted. On a jurisdictional challenge, the Court of King's Bench upheld the convictions. Early in the proceedings, that court observed:

> It was very difficult to have justice done in Wales by a jury of Welshmen, for they are all related to one another, and therefore would rather acquit a criminal than have the scandal that one of their name or relations should be hanged; and that to try a man in Wales for murder was like trying a man in Scotland for high treason, those being crimes not much regarded in those respective places.[5]

In this way, during the eighteenth century the Court of King's Bench in London established a concurrent jurisdiction with the Courts of Great Session over Welsh affairs and this led eventually to the decline of the Great Sessions and their abolition in 1830 when the Assize system was extended to Wales. Thereafter, the machinery of justice in Wales was largely indistinguishable from that in England.[6]

The administration of justice is not currently a devolved area. However, devolution has already had a profound impact on the administration of justice in a number of ways. At this stage I draw attention to just three. First, areas such as health, education and social care are devolved, and these are matters with which our courts are concerned on a daily basis. Moreover, there now exist exclusively Welsh tribunals deciding cases in these devolved fields, such as the Special Educational Needs Tribunal for Wales and the Mental Health Review Tribunal for Wales. Secondly, the powers conferred on the National Assembly and the Welsh Assembly Government mean that the first steps are being taken towards the development of a separate body of Welsh law in certain defined areas. For the first time since the early sixteenth century it is meaningful to speak once again of Welsh law. Thirdly, changes have come about with regard to the relationship between the judicial branch of government and the new bodies created by devolution. Here I refer not only to the judicial control of executive power in the form of judicial review of administrative action by the Welsh Ministers, but also to the creation of appropriate channels of communication between the judiciary and the new Welsh institutions of government. This is, therefore, an appropriate time at which to take stock of the ways in which the administration of justice is adapting to the changing situation.

We have come a very long way in little more than a decade since the passing of the Government of Wales Act 1998. My personal view is that it was a huge

5 (1723) 8 Mod. 136. See Sir David Williams QC, 'The Law of England and Wales: The Welsh Contribution', *Transactions of the Honourable Society of Cymmrodorion* (2005), 161, 166–7, where the author also draws a parallel with the trial of Saunders Lewis, the Revd. Lewis Valentine and D.J. Williams at the Old Bailey in 1936.

6 Sir John Thomas, 'Legal Wales: Its Modern Origins and its role after Devolution: National Identity, the Welsh Language and Parochialism', *Welsh Legal History*, 1 (2001), 113, provides a fascinating account of the largely unsuccessful attempts during the nineteenth and twentieth centuries to secure some recognition of the different needs of Wales within the legal system of England and Wales.

deficiency that there was no prior constitutional convention to consider the powers and structures appropriate to a devolved Wales. In the event, in the words of Professor Sir David Williams, 'Wales was whisked into devolution on the hem of a kilt.' Since then we have seen massive changes to the devolution settlement and we have been rightly reminded that devolution is an ongoing process. There are current proposals which, if they are accepted, will bring about further major changes in devolved executive and legislative functions in Wales. Inevitably, widely differing views are held as to what form any future changes should take and as to the pace of change.[7]

The All Wales Convention, which reported in November 2009, addressed directly the fundamental question whether it is now time for Wales to have its own legal jurisdiction. Having regard to the changes which have already taken place and those which are contemplated, should Wales now have its own legal system distinct from that of England? It consulted widely and found a general consensus in Wales that, at this time, a separate jurisdiction is not required. It concluded that, while Wales needs appropriate legal institutions and systems to support the progress of devolution and the developing legislative competence of the National Assembly for Wales, a separate Welsh jurisdiction is not a precondition for the development of increased legislative competence, even if the Assembly were to acquire the substantial powers of the Scottish model. It addressed the question in a wide context and concluded that the courts of England and Wales are fully competent to decide cases involving the laws of England and Wales, the laws of Wales only and European Union law. It seems likely, therefore, that, for the foreseeable future at least, Wales will continue to share a single jurisdiction with England. However, in coming to that conclusion the report made two further points of great importance. The first was to emphasize the need for legal checks on legislative and executive activity, with adjudications and remedies more readily available in Wales. Secondly, it considered it essential that legal structures in Wales keep pace with political devolution and that legal capacity is strengthened. It is, it said, vital that the administration of law in Wales takes account of Welsh legislation and is more sensitive to devolution.[8] In these circumstances it is appropriate to enquire to what extent the individual and special needs of Wales are taken into account within the joint legal system of England and Wales.

In this regard, it is important to note an important reform in relation to the administrative units of the courts system which was introduced in 2007. The courts in Wales had previously been administered with those in Cheshire as the Wales and Chester Circuit. Three years ago, the courts in Cheshire were transferred to the Northern Circuit and Wales now stands alone as an administrative unit within the legal system of England and Wales, a unit which is co-extensive with the territory of Wales. The Presiding Judges have become the Presiding Judges of Wales and

7 M. Supperstone, J. Goudie and P. Walker, *Judicial Review*, 4th edn (London, 2010), Chapter 21 provides a recent survey of the different arrangements in force in Wales, Scotland and Northern Ireland.

8 *All Wales Convention Report*, paragraph 3.9.22.

within Her Majesty's Court Service there is a separate administrative unit, HMCS Wales, with its own Director. This change was a painful one for many, in particular those members of the Bar who practised principally in north Wales from chambers in Chester. Old loyalties die hard and the Bar retain their professional association, the Wales and Chester Circuit of the Bar, which was established in 1945. However, there can be little doubt that the new arrangement in the administration of the courts makes sense in an era of devolution, not least because it will facilitate the relationship between the judiciary and the other branches of government and other justice agencies in Wales. It has advanced the objective that Welsh cases should be tried in Wales. Moreover, it has undoubtedly enhanced the Welsh identity of the judiciary serving Wales.

The judiciary in Wales

Although this article focuses on the differences between Wales and England, it is important not to lose sight of the fact that both nations have much in common. In particular, we share a great tradition in the common law to which many Welshmen have made distinguished contributions over the last five centuries. Wales has long been a net exporter of lawyers and since the Middle Ages the roads to the Inns of Court have been thronged with Welshmen. It comes as no surprise, therefore, that today Wales is served by a professional judiciary with a very strong Welsh identity. The judges of Wales are to a very large extent Welsh men and women who have practised the law either in Wales or in London before taking up judicial appointments in Wales.

There are currently thirty-four Circuit Judges and thirty-two District Judges who sit full-time in Wales hearing criminal and civil cases. They are led by two High Court Judges who are appointed Presiding Judges for Wales for terms of four years. Each of the Presiding Judges sits for half the year in London and half the year in Wales. In addition, specialist High Court Judges act as Liaison Judges for Wales in the Queen's Bench, Family and Chancery Divisions. Other High Court Judges sit in Wales at intervals throughout the year.[9] There are currently six Welsh men and one Welsh woman on the High Court Bench and five Welsh Lords Justices in the Court of Appeal, a record number. Today, judges at all levels are appointed following competitions administered by the Judicial Appointments Commission, which is required to have a Welsh member.

The head of the judiciary in England and Wales is the Lord Chief Justice. In 1998, the then Lord Chief Justice, Lord Bingham of Cornhill, took an executive decision that his office should be known as that of 'Lord Chief Justice of England and Wales'. The present incumbent of that office, Lord Judge, takes his duties as

9 In a major change, the Administration of Justice Act 1970 enabled the High Court to sit outside London and civil cases no longer had to be commenced in London, heard at *nisi prius* in the county and then passed back to London for judgment. The Assizes and Quarter Sessions were abolished by the Courts Act 1971. See Watkin, *Legal History of Wales*, p. 195.

Lord Chief Justice of Wales very seriously indeed. He is frequently in Wales hearing cases, delivering lectures, meeting judges and Welsh Ministers. His inspirational leadership has contributed greatly to the sense of collegiality among the Welsh judiciary.

Almost every specialist jurisdiction is represented in Wales. There is a Chancery Judge for Wales, a Mercantile Judge for Wales[10] and there are judges who sit in the Technology and Construction Court in Wales. These judges are based in Cardiff but sit wherever in Wales the need arises. That the Administrative Court sits throughout Wales is a matter of constitutional importance. The only specialist jurisdiction not currently represented in Wales is the Admiralty jurisdiction and it is to be hoped that that omission may soon be remedied.

As with almost every aspect of life in Wales, geography and the difficulties of travelling between the north and the south pose special problems. Inevitably, the great majority of the judges who sit permanently in Wales are based in the south east where most of the population lives and most of the cases arise. Since the break with Cheshire, there are only six Circuit Judges and five District Judges based in north Wales. The Presiding Judges are anxious to prevent their becoming isolated from their colleagues in south Wales and as a result arrangements have been made for Circuit Judges to sit away from their base courts. This traffic between north and south has done a great deal to increase the sense of unity of the judiciary in Wales, a spirit which is further promoted by regular meetings of the judiciary. Furthermore, there has recently been created an Association of Judges of Wales, of which both serving and retired judges are members and of which the Lord Chief Justice is the President.

The judges of Wales are very industrious. The Crown Courts in Wales were recently praised by the National Audit Office as the most efficient in England and Wales. However, we are not infallible and there has to be provision for appeals. The Court of Appeal is based in London but both the Civil Division and the Criminal Division of the Court of Appeal sit regularly in Cardiff hearing Welsh appeals. Thus, in June 2010, the Court of Appeal sat in Cardiff at short notice to hear an appeal in relation to the proposed badger cull[11] and in the following month it sat there again, this time with the Master of the Rolls presiding, to hear an appeal concerning the hardship provisions of the Common Agricultural Policy.[12] Not all appeals from Wales are heard in Wales by any means, but the fact that the Court of Appeal sits in Wales – it is currently the only place outside London where the Civil Division sits – is an important acknowledgement of the different constitutional position of Wales following devolution and of the importance of Cardiff as a capital

10 Opening the Mercantile Court in Cardiff in 2000, Lord Bingham, the then Lord Chief Justice, said: 'This court represents the long overdue recognition of the need for the Principality of Wales to have its own indigenous institutions operating locally and meeting the needs of its citizens here. This court is another step towards recognising Wales as a very proud, distinctive and successful nation.'

11 *R. (Badger Trust) v. Welsh Ministers* [2010] EWCA Civ 807.

12 *R. (T.A. Gwilim and Sons) v. Welsh Ministers* [2010] EWCA Civ 1048.

city.

The front-line troops in the administration of criminal justice in Wales are undoubtedly the Justices of the Peace. They are appointed by the Judicial Appointments Commission and there are currently 1,833 magistrates in Wales, sitting in twenty-three benches. These lay magistrates sit in the Magistrates' Courts, where they hear over 95% of the criminal cases in Wales, but they also have important jurisdictions in licensing and in the Family Proceedings Courts where they hear, in particular, cases concerning the custody of children. In this way they play a vital role in the administration of justice in Wales. They too have created distinctively Welsh institutions: the Wales Bench Chairs Forum, the Wales Committee of the Magistrates' Association and the Crickhowell Group.

In their criminal jurisdiction they are assisted by six District Judges (Magistrates Courts), professional members of the judiciary who sit alone to hear summary trials. They are the successors to the Stipendiary Magistrates who were first appointed to sit in the nineteenth century. Professor Thomas Glyn Watkin has referred to the wise and substantial contribution they made to the maintenance of public order in the south Wales valleys a hundred years ago.[13] Happily, we no longer face such problems but their successors continue to make a major contribution to the administration of justice at a local level.

The administration of the courts and other participants in the justice sector

Within the executive branch of government, responsibility for the administration of justice in England and Wales rests with the Ministry of Justice headed by the Cabinet Minister who performs the two roles of Lord Chancellor and Secretary of State for Justice. The organization and running of the courts is the responsibility of Her Majesty's Court Service (HMCS), an agency within the Ministry of Justice. Relations between HMCS and the judiciary are governed by a Framework Agreement between the Lord Chancellor and the Lord Chief Justice. Within Wales, HMCS Wales, under its Director, Clare Pillman, works closely with the two Presiding Judges of Wales in managing the system of support which enables the judges to carry out their independent functions. HMCS Wales is responsible, amongst other things, for financing and administering the day-to-day running of the courts, for employing court staff and for the provision and maintenance of court buildings. HMCS Wales has a budget of £48.65 million in the current year (2010).

The justice sector, vital as it is, is not exempt from current financial pressures and we face the prospect of substantial cuts in the near future. In particular, on 23rd June 2010 HMCS announced proposals to close thirteen magistrates' courts and three county courts in Wales. At this time, they remain proposals. A period of consultation has produced widespread and informed responses. It is entirely understandable that these proposals are causing real concern in the areas affected.

13 Watkin, *Legal History of Wales*, p. 196.

The Presiding Judges and HMCS Wales are particularly mindful of the special needs of rural Wales in respect of access to justice. The Lord Chancellor is expected to take his decisions in late 2010 or early 2011.

The judiciary and the Courts Service work in close association with other bodies and agencies in the justice sector. These include the police, the Wales Probation Trust, the National Offender Management Service, the Crown Prosecution Service, coroners, the Legal Services Commission, the Law Society and the Bar.

The courts could not function without the professional lawyers who provide advice and representation for those involved in civil or criminal matters. There are now five law schools in Wales. Today, there are 2,606 solicitors in practice in Wales and 345 barristers who are members of what remains the Wales and Chester Circuit. The changes which are now taking place afford great opportunities to both branches of the profession. In particular, some members of the Bar have seized the opportunity provided by the Administrative Court in Wales but we need many more to develop expertise in the field of public law so that representation and advice in this essential field are readily available in Wales.

The Administrative Court in Wales

The point at which the courts come into the most direct contact with the acts of devolved institutions and local government bodies in Wales is in the Administrative Court, which hears challenges to the legality of the acts of public bodies. The Jones Parry Report placed particular emphasis on the need for adjudications and remedies in this area of judicial control of administrative action to be more readily available in Wales.[14] I believe that we are already well on the way to achieving this as a result of the new arrangements for the sittings of the Administrative Court in Wales.

With the first phase of devolution under the Government of Wales Act 1998, it was rapidly acknowledged as essential that legal challenges to decisions of the newly created institutions and other public bodies in Wales might be brought, heard and decided in Wales. As a result, arrangements were made for the Administrative Court to sit in Wales. This was the first occasion on which the Administrative Court had sat regularly outside London.

In the years which followed, a substantial number of applications for judicial review were heard in the Administrative Court sitting in Wales under those arrangements. They included cases against the National Assembly for Wales, the Welsh Ministers and local authorities. They covered a wide range of subject matter including, for example, the validity of a sea fisheries order, the proper interpretation of European Union regulations on the common agricultural policy, the lawfulness

14 *All Wales Convention Report*, paragraph 3.9.22.

of allocation of landfill sites, and the fate of Shambo, the Hindu Temple bull.[15] Hearings took place principally in the Civil Justice Centre in Cardiff, but also in other courts in Wales. In November 2006, in *National Assembly for Wales v Condron*,[16] the Court of Appeal observed, in a case concerning planning permission for opencast mining at Ffos y Fran near Merthyr Tydfil which had been heard at first instance and on appeal in London, that it cried out to be heard in Wales both at first instance and on appeal and expressed its considerable regret that that had not occurred. In October 2007, in *R. (Deepdock Limited and others) v The Welsh Ministers*,[17] the Administrative Court emphasized that challenges to decisions made in a devolved area by a Welsh national authority, such as the Welsh Ministers, or by a Welsh local authority should ordinarily be heard in Wales unless there is good reason for the hearing to take place elsewhere. These decisions proved important milestones in the development of judicial review in Wales.

In April 2009, these arrangements were replaced as part of a series of reforms implementing the recommendations of Sir Anthony May's report into administrative justice outside London. Although the resulting structure in Wales is very similar to that adopted in the case of Birmingham, Manchester and Leeds, the other principal centres outside London where the Administrative Court now sits, the arrangements set in place in Wales have an added significance and importance because they operate in the context of Welsh devolution.

The Administrative Court in its new form opened for business in Wales on 27 April 2009. An essential change is that the court is now administered by a team based at the Cardiff Civil Justice Centre, as opposed to the Royal Courts of Justice in London. The new arrangements have the advantage of enabling the Court to operate more efficiently and to provide a speedier service.

It has become necessary to make rules as to where cases shall be heard.[18] There is no absolute rule requiring that Welsh cases be heard in Wales but there is a robust judicial policy of transfer which will ensure that in future Welsh cases will normally be heard in Wales. Once proceedings have been assigned to Wales, the proceedings will be both administered from Wales and determined by a judge of the Administrative Court at a suitable court within Wales. Within Wales, arrangements have been made for the Administrative Court to sit at any

15 *R (South Wales Sea Fisheries Committee) v National Assembly for Wales* Judgment, December 21, 2001 (validity of sea fisheries order); *R (Gwillim) v Welsh Ministers* [2009] EWHC 2946 (Admin) (proper interpretation of EU regulations on subsidies under the common agricultural policies); *R (Newport City Council) v Welsh Ministers* [2009] EWHC 3149 (Admin) (lawfulness of landfill allocations to waste disposal authorities); *R (Swami Suryananda) v Welsh Ministers* [2007] EWHC 1736 (whether order requiring destruction of a Hindu temple bull compatible with Article 9 ECHR): the Court of Appeal also sat in Cardiff to hear the appeal; see [2007] EWCA Civ 893.

16 [2006] EWCA Civ 1573, per Richards L.J. at paragraph 110.

17 [2007] EWHC 3347.

18 Practice Direction 54D.

court centre as appropriate. The court centres at Caernarfon, Cardiff, Mold and Swansea have been designated as suitable for hearings. Administrative Court cases are heard most frequently in Cardiff but cases are also heard at the other designated court centres.[19]

Each term, at least two nominated High Court Judges, including the Queen's Bench Liaison Judge, hear public law cases in Wales for part of the term. In addition, cases before the Administrative Court in Wales are heard by one of seven Welsh Circuit Judges or four Welsh QC Recorders, all of whom sit as Deputy High Court Judges in the Administrative Court both in London and in Wales.

The service provided by the Administrative Court in Wales is completely bilingual. All of the court forms relating to public law proceedings have been translated into Welsh by the Language Unit of HMCS and they are readily available. In addition, there are judges able to conduct hearings in Welsh.

In the first year of the operation of the Administrative Court in Wales under the new arrangements, 178 cases were dealt with there, including 39 cases which were transferred from London to Wales. Only three cases were transferred from Wales. The cases heard by the Administrative Court in Wales in its first year have included cases on animals, agriculture, child support, community care, education, housing, immigration and asylum, local government, mental health, police powers, prisons, public health and planning.

It is interesting to note the speed with which this major reform has come about. It has not required any legislation but has evolved to meet changing needs. In its reconstituted form, the Administrative Court in Wales is an important national resource which will make a major contribution to the administration of justice and to public administration in Wales. One major objective of the new arrangements is to ensure ready access to justice in the field of public law and it is likely that they will greatly facilitate the bringing and the efficient management of public law proceedings in Wales. In their application to a devolved Wales they obviously have a further vital dimension and it is to be hoped that they will continue to provide an appropriate framework for legal controls on administrative action as the devolution settlement evolves.

The Senior Judiciary, the Welsh Assembly Government and the National Assembly for Wales

Fortunately, contacts between the judiciary and the executive are not limited to encounters in the Administrative Court. The senior judiciary have frequent contact with ministers in Whitehall. In particular, it is the practice of Her

19 Administrative Court in Wales; Identification of Court Centres at which the Administrative Court may sit; Notice of 19th May 2009.

Majesty's Government to consult the Lord Chief Justice and other senior judges in relation to the practical application of policy and legislative proposals which affect the operation of the justice system in England and Wales and on those proposals which affect Her Majesty's Court Service. This consultation reflects the fact that the judiciary is responsible for its branch of state and is consistent with the new constitutional position of the Lord Chief Justice as the Head of the Judiciary in England and Wales.

The recent changes in the government of Wales now make it appropriate that this process of constructive consultation be replicated in the relationship between the Lord Chief Justice and the Welsh Ministers. Accordingly, there have recently been instituted meetings between the Lord Chief Justice and the First Minister, the Counsel General and the Permanent Secretary. These meetings permit consultation on matters which affect the administration of the courts, which are likely to bring changes to any branch of the criminal law or which are to have an effect upon the operation of the judicial branch of government in Wales. It is likely that, very shortly, similar channels of communication will be established between the judiciary and the National Assembly and its Committees. In this way, the first steps are being taken in a process by which the judiciary can engage effectively with the Welsh Assembly Government and the National Assembly for Wales, and other bodies with an interest in justice in Wales.

These discussions have to operate within the limits set by constitutional propriety. The judiciary are not able to comment on the desirability of government policies, nor are they able to contribute to any debate which is likely to lead to litigation. More generally, it is important that there should be a correct appreciation of the constitutional position of the judiciary in this regard. It is not for the judges to take any part in the political debate as to the way in which the constitution of Wales develops. This point was made very forcefully by the Lord Chief Justice in his lecture to the Legal Wales conference in Cardiff in October 2009 when he said this:

> The way in which justice will be administered in Wales in the end will I hope be determined by the way in which the constitution of Wales actually develops, rather than by some anticipation of the way in which it might develop, or which some might hope that it would develop. Ultimately the constitutional issues are for political not judicial decision. To be legitimate, any legal system needs to keep pace with and reflect political changes, but I respectfully suggest that the legal system cannot be manoeuvred so that it can be seen to be a force for change or against change, or any particular direction of change, or as advancing or supporting the views of one or other of the different sides of the arguments all legitimately advanced in a democracy by the protagonists [...]. That is not my view as Lord Chief Justice of Wales and England: that represents my view as Lord Chief Justice of Wales. Judges cannot force the pace nor can they

> obstruct developments based on the ballot box and the constitution. We must be neutral. Nothing comes without a price, and one of the foundations on which the respect for the independence of the judiciary is based in this country is that judges cannot be catalysts for political change.[20]

However, he went on to emphasize that what the judiciary can do, and can legitimately do, in the context of Wales, is to respond to the fact of devolution and the changes that have already taken place and are now embedded within the constitution. The judges are, in fact, very much alive to the changes which are taking place and, whatever the future holds in this regard, they are anxious to ensure that the legal system and the judiciary are able to adapt to meet the needs of the people of Wales under a changing constitution.

A further recent development in this regard has been the creation by the Lord Chief Justice in April 2010 of a Committee, which he chairs personally, to advise him on Welsh issues. This Committee forms part of the structure of the Judges' Council. The Judges' Council Committee on Wales will facilitate links between the Welsh Assembly Government and the National Assembly for Wales and the Judiciary of England and Wales. In particular, the committee will consider and provide advice to the Lord Chief Justice on the implications for the administration of justice in Wales arising from new policies, proposals or legislation emanating from either London or Cardiff. The membership of the Committee comprises the Lord Chief Justice, the senior Welsh Judge, the Welsh judges who are members of the Judicial Executive Board, the Senior Presiding Judge of England and Wales, the Presiding Judges of Wales, the Family Division Liaison Judge for Wales, the Secretary of the Association of Judges of Wales and representatives of the Circuit Bench, the District Bench, the Tribunals and the Magistracy in Wales. The HMCS Director for Wales, Clare Pillman, also attends the meetings. Its secretary is the Lord Chief Justice's Legal Secretary, Rebecca Williams, who comes from Tonypandy.

The creation of this committee and the institution of these new links between the judiciary and the devolved institutions are further recognition that special provision now has to be made for Wales within the shared legal system of England and Wales. They provide further examples of the ways in which the judicial branch is adapting in order to meet the changing needs of a devolved Wales. These measures should go a considerable way to satisfying the recommendation of the All Wales Convention that the administration of justice in Wales should be more sensitive to devolution.

20 Lord Judge, Lord Chief Justice, Lecture to Legal Wales Conference, Cardiff, 9th October, 2009. <http://www.judiciary.gov.uk/docs/speeches/lcj-legal-wales-conf.pdf> [accessed 30 November 2010].

Tribunals

Many legal disputes are not dealt with by the courts but by specialist tribunals. Accordingly, the tribunal system is a legal institution which plays a vital role in the lives of many people in Wales. This is an area which has recently seen massive changes. Throughout the United Kingdom, the tribunal system has undergone a major restructuring. But in Wales, the changes have been even more fundamental as a result of devolution.

The first phase of devolution under the Government of Wales Act 1998 devolved executive responsibility for policy areas including education, health and social services and housing. This included the transfer of executive responsibility for tribunals concerned with those policy areas within Wales. The National Assembly also acquired the power to create new tribunals and appeal mechanisms in some devolved policy areas. As a result, tribunals operating in Wales now fall into two categories: Welsh Tribunals, which operate in fields for which executive responsibility has been devolved, and Cross-Border Tribunals, which operate in fields for which it has not. The former – the Welsh Tribunals – include the Agricultural Land Tribunal (Wales), the Independent Social Services Complaints Panels, the Local Health Boards in Wales (in respect of certain functions), the Mental Health Review Tribunal for Wales, the Residential Property Tribunal, School Admission and Exclusion Appeal Panels, the Special Educational Needs Tribunal for Wales, and the Valuation Tribunals for Wales. These will shortly be joined by a new Welsh Language Tribunal, created by the Welsh Language Measure.

The fact that the Welsh tribunals have developed on an ad hoc basis has led to a fragmented system with wide variations in many areas, including appointment processes, budgets, training and appraisal and support for users. In January 2010, the Welsh Committee of the Administrative Justice and Tribunals Council published a Report[21] in which it drew attention to these shortcomings and made far-reaching recommendations for the modernization and development of the Welsh tribunals. A central problem identified by the Report is that in many instances responsibility for tribunals and their administration lies with the departments in the Welsh Assembly Government whose decisions it is the tribunal's duty to consider. The Report rightly criticizes this as unacceptable. Tribunals must be independent of the Government Departments concerned. There has been a ready acceptance of this by the Assembly Government which has also accepted the recommendation that there should be a single focal point within the Assembly Government – independent of the departments concerned

21 Welsh Committee of the Administrative Justice and Tribunals Council, *Review of Tribunals Operating in Wales*, January 2010. The Report is made to Welsh Ministers pursuant to paragraph 19(4) of Schedule 7 to the Tribunals, Courts and Enforcement Act 2007. See also Sir John Thomas, 'Our Changing Governance Structures; Clarity And Confidence', Welsh Governance Centre, March 2010, <http://devolutionmatters.wordpress.com/2010/03/26/lord-justice-thomass-st-davids-day-lecture/> [accessed 30 November 2010].

– responsible for determining policy in relation to the Welsh Tribunals and for their administration.

In an even more recent development, it has been announced that throughout England and Wales the Courts Service and the Tribunals Service are to merge in April 2011. When this is implemented, the Cross-Border Tribunals, to the extent that they operate in Wales, will be administered by a Joint Courts and Tribunals Service based in Cardiff and Mold. It may be appropriate for this body also to administer the Welsh Tribunals on behalf of the Wales Assembly Government.[22]

The Welsh language and the courts

One of the reasons given in the Act of Union of 1536 for the incorporation of Wales into the Realm of England was that:

> The People of the same Dominion have and do daily use a Speech nothing like, nor consonant to the natural Mother Tongue used within this Realm.

As a result, that statute not only provided for the annexation of Wales but also included the chilling injunction:

> That from henceforth no Person or Persons that use the Welsh Speech or Language shall have or enjoy any Manner Office or Fees within this Realm of England, Wales or other the King's Dominions.

That prohibition, of course, included judicial office.

A clear echo of this can be heard in the Government Report on Education in Wales published in 1847:

> The evil of the Welsh language [...] is obviously and fearfully great in courts of justice [...]. It distorts the truth, favours fraud, and abets perjury, which is frequently practised in courts, and escapes detection through the loop-holes of interpretation [...]. The mockery of an English trial of a Welsh criminal by a Welsh jury, addressed by counsel and judge in English is too gross and shocking to need comment. It is nevertheless a mockery which must continue until the people are taught the English language [...].[23]

The solution was obvious – to stamp out the use of the Welsh language. The Treason of the Blue Books, indeed.

22 See Evans, 'Devolution and the Administration of Justice', p. 8.

23 *Reports of the Commissioners of Inquiry into the State of Education in Wales: Accounts and Papers* (London, 1847), vol. 27, Pt. ii, p. 66.

In reality, however, it appears that Welsh continued to be used in courts of law in Wales. The Hughes Parry Committee observed in 1965:

> Though the law was administered in English, the Welsh language was undoubtedly widely used in the law courts from those at the highest level, like the Council of the Marches and the Court of Great Sessions, down to the humblest hundred and manor courts.[24]

Fortunately, a more enlightened attitude prevails today. In 1999, the present Lord Chief Justice of England and Wales, Judge L. J., as he then was, in his judgment in the Court of Appeal in *Williams v. Cowell*, referred to the prohibitions on the use of Welsh in the Laws in Wales Act 1535, and added:

> In other words Welsh people appearing in courts in Wales, litigating over problems in their own country, were prohibited from using their own language. Mr Williams and those who support him no doubt regard this legislation, and the subsequent Act of 1542 [...] as an outrage [...] for what it is worth I agree with them.

That litigants, defendants, and witnesses should be allowed to use in court the Welsh language in which they conduct their everyday lives seems no more than the most basic fairness. Today, pursuant to the Welsh Language Acts of 1967 and 1993, Welsh is used extensively in the courts in Wales as of right. It is used most frequently in magistrates' courts and in family law cases and this occurs predominantly in the heartland of the language in the north and the west, although this is not invariably the case. Perhaps the high water mark to date has been the murder trial before Roderick Evans J. in Caernarfon in 2007, where the entire trial was conducted in Welsh with simultaneous translation into English.

The Courts Service and the Tribunals Service are currently undertaking surveys of the extent to which the Welsh language is used before courts and tribunals in Wales. The difficulty in obtaining reliable figures lies in the fact that litigants, witnesses and lawyers tend to switch from one language to the other during the course of the hearing, in the most natural way. As a result, such figures as have hitherto been available are likely to understate the extent to which Welsh is used in court.

24 Cmnd. 2785, at para. 31; Williams, 'The Law of England and Wales', 168. On the Hughes Parry Report see, generally, R. Gwynedd Parry, *David Hughes Parry, A Jurist in Society* (Cardiff, 2010), chapter 9. It appears, moreover, that the Welsh language was used extensively in County Courts in Wales from their creation in 1846. See Thomas, 'Legal Wales', 115–8, 136–149. The language clause of 27 Hen. 8 c. 26 was repealed by section 1, Welsh Courts Act, 1942. However, that provision did not confer a right to use Welsh in the courts; it merely provided that '[...] the Welsh language may be used in any court in Wales by any party or witness who considers that he would otherwise be at any disadvantage by reason of his natural language of communication being Welsh.' See *R. v. Merthyr Tydfil Justices, ex parte Jenkins* [1967] 1 All ER 636.

Policy matters concerning the use of Welsh in the justice sector are considered by the Lord Chancellor's Standing Committee on the Welsh Language. This body, which advises the Lord Chancellor, has the great advantage that it includes representatives from all the bodies in Wales concerned with the administration of justice and from the Welsh Language Board. At a practical level, the Justice Wales Network has been set up to enable justice agencies to share good practice in relation to language training and bilingual service provision, to co-ordinate efforts and to share resources.

In the early 1990s, the Courts Service established a Welsh Language Unit with responsibility for translation. It has grown beyond recognition and has now moved from Llangefni to accommodation in the new Crown Court at Caernarfon. It is a major resource for the administration of justice in Wales and I draw attention to the immense contribution it has made under its Head, Hywel Hughes. Similarly, Margaret Davies, the Welsh Language Policy Officer of HMCS, based in Cardiff, has done sterling work to promote and facilitate the use of Welsh in the courts. Translations in the courts are provided by a skilled team whose highly professional service permits cases in Welsh to be dealt with efficiently and fairly.

At present, twelve Circuit Judges, ten District Judges, fifteen Deputy District Judges and thirteen Recorders are able to conduct hearings in Welsh. There are therefore fifty Welsh-speaking judges. Many others are learning Welsh and have sufficient command of the language to be able to follow evidence given in Welsh. It is, of course, vital that we should have sufficient judges to meet this increasing need. Specialist training for judges in the use of the Welsh language in court is provided by the Judicial Studies Board. In recent years, it has held annual courses which have done a great deal to enhance the skills and proficiency of the Welsh-speaking judiciary. The fact that so many of the Welsh judges are Welsh speakers is a further aspect of the strong Welsh identity of the judiciary in Wales.

The Liaison Judge for the Welsh language is responsible for securing the successful delivery of services in Welsh and promoting the use of Welsh in the courts. In Her Honour Judge Eleri Rees, the current Liaison Judge, the Welsh language has a good friend and a doughty champion.

The decision of the Ministry of Justice in 2010 to reject a proposal that would have permitted the selection of entirely Welsh-speaking juries has been greeted with disappointment in certain quarters. There are many competing interests in play here. These include the wish of complainants and defendants to give evidence to the tribunal of fact in their own language, the desire to encourage greater use of the Welsh language, the importance of the principle of random selection of juries, the need to provide an efficient procedure for jury selection, the need to maintain confidence in the system of jury trial and, above all, the need to ensure that a defendant has a fair trial. In the result, the importance of random selection of juries has prevailed. In her announcement of 9 March 2010, the Justice Minister

justified the decision on the grounds that juries must be selected at random from the whole community and that to exclude from a jury those unable to speak Welsh would exclude about four-fifths of the population of Wales. This is a particularly problematical area and there can be little doubt that the debate will continue.

So far as appointment of the judiciary is concerned, it is possible to specify that the ability to speak Welsh is essential for appointment to a particular post and this frequently happens. Similarly, following an initiative of the Lord Chancellor's Standing Committee on the Welsh Language, the Ministry of Justice announced in 2010 that in future it will be possible to advertise for Welsh-speaking magistrates. There are currently 350 Welsh-speaking magistrates and this development will ensure that we will be able in future to maintain the Welsh-speaking magistracy at least at that level.

I cannot pretend that this is an unalloyed story of success. In particular, HMCS Wales has encountered real difficulties in introducing information technology systems which will provide a bilingual service. However, a great deal has already been achieved and there is a whole-hearted commitment to meeting the growing demand for the provision of court services in the Welsh language.

Conclusion

We are very fortunate to live at a fascinating time in the history of Wales. As a Welshman, I rejoice in the renaissance which has taken place in so many different areas of life in Wales in recent years, but above all in the revival of the Welsh language which is an essential element of our identity as a nation.

Delivering the Law Society Lecture at the National Eisteddfod in 2008, Carwyn Jones, then Counsel General, now First Minister, spoke of the need for institutions of justice managed locally, which are responsive to the needs of Wales and are familiar with the law as it applies to Wales.[25] This paper has attempted to demonstrate that the machinery of justice in Wales is adapting to take account of the changes which are taking place. As the All Wales Convention concluded, 'There is a growing concept of Wales having more of its own legal personality.'[26] Furthermore, while it is certainly not for the judiciary to be the drivers of further constitutional change in Wales, it is essential that the senior judiciary remain vigilant to ensure that the machinery of justice continues to meet the special needs of the people of Wales as the process of devolution continues. Whatever the future may hold in that regard, I am confident that the judiciary will rise to the challenge. That we should do so is vital to the maintenance of the rule of law which, when all is said and done, remains one of the great blessings of life in our nation.

25 Carwyn Jones, 'Law in Wales – The Next Ten Years', p. 13.
26 *All Wales Convention Report*, paragraph 3.9.22.